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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FLORENCE COUNTY SCHOOL DISTRICT FOUR, ERNEST K. NICHOLSON, SUPERINTENDENT, IN HIS OFFICIAL CAPACITY, AND SCHOOL BOARD MEMBERS BENNIE ANDERSON, MONROE FRIDAY, JACK ODOM, ELRITA BACOTE, T.R. GREEN, JAMES W. HICKS, IN THEIR OFFICIAL CAPACITY,

Petitioners,

v.

SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether a learning disabled child's parents are entitled to state reimbursement under the Individuals with Disabilities Education Act (IDEA), when they unilaterally place her in a private school that does not meet state educational standards or in other respects satisfy the criteria of a "free appropriate public education," which the state is required under 20 U.S.C. §§ 1401(a)(18) and 1412(1) to provide as a condition of receiving federal funding under the Act.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-19a) is reported at 950 F.2d 156 (4th Cir. 1991). The order and decision of the United States District Court for the District of South Carolina (Pet. App. 20a-39a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1991. On February 11, 1992, this Court granted Petitioners' request for an extension of time in which to file their Petition for a Writ of Certiorari until March 24, 1992. The Petition was timely filed on March 23, 1992, and certiorari was granted, restricted to the first question presented in the Petition, on February 22, 1993. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant sections of the Individuals with Disabilities Education Act, 20 U.S.C.A. § 1400 *et seq.* (West 1990 & Supp. 1993), its accompanying regulations, 34 C.F.R. §§ 300.1-300.754 (1992), and certain provisions of South Carolina law, are set forth in the Appendix to the Petition for Writ of Certiorari. Pet. App. 56a-72a.

STATEMENT

At issue here is whether the Individuals with Disabilities Education Act justifies court-ordered reimbursement of parents who, dissatisfied with what is later found to be a legally deficient public school placement, unilaterally enroll their child in a private school setting that fails to meet the Act's explicit requirement of a free appropriate public education.

1. *The Statutory Scheme*: The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ("IDEA" or "Act"), formerly titled the Education of the Handicapped Act, imposes a number of conditions on states in return for federal funds to aid in educating children with disabilities. The essential condition is that states provide a "free appropriate public education" ("FAPE"). 20 U.S.C. § 1412(1). Pursuant to the Act, a FAPE consists of schooling that is provided at public expense, under

public supervision and direction, in conformity with an "individualized education program" ("IEP"), and, significantly, one that meets the standards of the state educational agency. *See* 20 U.S.C. § 1401(a)(18).

This express incorporation of state laws and regulations governing the provision of education in general, and education to children with disabilities in particular, provides substantive content to the essentially procedural cast of the Act's other requirements. In South Carolina, private schools in which handicapped children have been duly placed as well as all public schools must conform to the Defined Minimum Program for South Carolina School Districts (1986) ("DMP"). S.C. Code Regs. 43-243(E)(7), Pet. App. 69a-71a.

The DMP is designed to ensure "adequate education opportunities to every student." DMP at 1. This is achieved through South Carolina's definition of the "minimum acceptable education program," and through the requirement of "adequate human and financial resources to insure at least the minimum program [will] be obtained." *Id.* The DMP specifies the requirements teachers must meet in order to be certified and thus permitted to teach in South Carolina public schools. The DMP imposes substantial other requirements, including, *inter alia*, length of school year, pupil/teacher ratio, curricular offerings, and health and safety protective measures that schools must meet in South Carolina.

The centerpoint of the Act's procedural requirements is the IEP, which "results in individualized consideration of and instruction for each child." *Board of Educ. v. Rowley*, 458 U.S. 176, 189 (1982). Consistent with the Act's intention to foster cooperation between school officials and parents, this personally-tailored educational program must be prepared at a meeting between a qualified representative of the local education agency, the child's teacher, the child's parents or guardian, and, where appropriate, the child. 20 U.S.C. § 1401(a)(20).

By definition, the IEP consists of a statement of (1) the child's "present levels of educational performance"; (2) "annual goals, including short-term instructional objectives"; (3) "specific educational services to be provided"; (4) a "date for initiation and anticipated duration" of services; (5) "needed transition services for students"; and (6) "criteria and evaluation procedures" for determining whether the objectives are being met. 20 U.S.C. § 1401(a)(20). Under the Act, the IEP must be reexamined and reevaluated prior to the start of each school year, and can be revised periodically where appropriate. 20 U.S.C. § 1414(a)(5). Should disagreements ensue, the Act provides for review of the IEP in the first instance by the local education agency, with a hearing before an impartial arbiter. 20 U.S.C. § 1415(b)(2). Thereafter, review is available before the state education agency, 20 U.S.C. § 1415(c), and then in federal district court, 20 U.S.C. § 1415(e)(2).

In addition, states seeking to receive federal funding under the Act must submit a State Plan to the Secretary of Education. 20 U.S.C. § 1413. The Plan must include several assurances concerning, *inter alia*, proper expenditure of federal funds, personnel development and certification, and steps to be taken to assure a FAPE to all children with disabilities. 20 U.S.C. §§ 1412(2), 1413. Prior to release of federal funds, the Secretary of Education must approve a state's Plan. *Id.* at § 1413(c). South Carolina operates under an approved Plan.

2. *Facts*: Shannon Carter began her elementary education at the local public school in Florence County, South Carolina, School District Four in the fall of 1975. In order that Shannon could attend school "with the children that she was with in our community, at church" (C.A.J.A. 48),[1] Shannon's parents

[1] "C.A.J.A." refers to the joint appendix filed with the court of appeals. Facts have been included here as background material whose primary relevance is to Question 2 of our Petition for Certiorari, on which the Court denied certiorari. Rather than include supporting information on these matters in the joint appendix ("J.A.") filed pursuant to this Court's Rule 26, reference is made to the joint appendix in the Court of Appeals, copies of which were lodged with the Clerk of this Court at the time the Petition for Certiorari was filed.

withdrew her from the public school and enrolled her in a private academy in a neighboring county following first grade. Pet. App. 23a. Shannon completed her elementary education at the private school. *Id.* In the fall of 1982, her parents re-enrolled her in the Florence County public school to begin the seventh grade. *Id.* at 24a.

Shortly after Shannon's return to the public school, Mrs. Carter requested that tests be performed of Shannon's I.Q. and achievement levels.[2] The high school guidance counselor performed these tests, as did the school district's educational evaluator. Both sets of test scores indicated that Shannon was slightly below average in achievement, but reflected no learning disability. Pet. App. 24a.

In March 1985, upon discovering that Shannon had altered her report card to reflect better grades than she was actually receiving, Shannon's mother informed school administrators that she was considering placing Shannon in a private school despite the fact that the school year was nearing completion. C.A.J.A. 100-01. The school district determined that it would conduct an evaluation of Shannon. Those tests, conducted in the spring of 1985, suggested that Shannon had a serious learning disability. Pet. App. 25a.

During this time period, prior to the formulation of an IEP, Shannon's parents continued to suggest that they preferred not to have their daughter attending the public school, and that they were skeptical of the District's ability to provide special education

[2] Learning disabilities are acknowledged and quantified based on the difference between ability, as measured by a standard I.Q. test, and achievement (or performance). Pet. App. 25a.

services. C.A.J.A. 105, 109. Nonetheless, school officials continued their efforts under the IDEA to develop, with parental input, the proper educational program for Shannon. Accordingly, during the latter part of April 1985, District officials provided Mrs. Carter with the results of Shannon's evaluation and described to her a range of educational programs that the school would provide (at no cost to the Carters) that would be helpful to Shannon. In addition, in keeping with the IDEA, school officials outlined the statutory process for determining the proper educational program for Shannon, and the procedural rights under the IDEA attendant to that process. C.A.J.A. 106, 109, 143. The officials also provided Mrs. Carter with written descriptions of the process and of her rights under the IDEA. C.A.J.A. 143.

On May 1, 1985, the District officials and the Carters met to formulate the specifics of an IEP for Shannon. The school district proposed that Shannon remain in regular classes to a substantial degree, consistent with the IDEA's "mainstreaming" requirement, 20 U.S.C. § 1412(5)(B),[3] and spend at least one period each school day in the school's specialized "resource room" where she would receive intensive, personalized tutoring along with two to four other students. C.A.J.A. 121, 123. Shannon's parents strongly objected to the proposed "resource room" placement. Instead, they insisted upon an "itinerant program," under which Shannon would receive private tutoring from a particular teacher of their choosing, notwithstanding that it would involve fewer

[3] The Act requires participating states to establish "procedures to assure that, to the maximum extent appropriate, children with disabilities. . . are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . . ." 20 U.S.C. § 1412(5)(B).

hours of special instruction per week than would occur under the "resource room" placement.[4] Pet. App. 26a n.7.

In addition, the social worker hired by Shannon's parents requested that the District establish easy-to-achieve goals for Shannon. This would, according to the social worker, benefit Shannon by minimizing her risk of failure and increasing her self-esteem. C.A.J.A. 278, 282-86. After some discussion, the IEP was signed by both Shannon's parents and representatives of the District, incorporating both the itinerant proposal and the modest goals proposed by the Carters' social worker. These goals, which were to be viewed as the minimum gains to be achieved, consisted of four months' progress in reading and four months' progress in math. Pet. App. 27a.

The IEP took effect toward the last quarter of Shannon's ninth grade year. Shannon's grades improved substantially in the grading period immediately following implementation of the IEP; indeed, from two D's and three F's in the first semester of that year, Shannon went to one B and four C's in the second semester. C.A.J.A. 52-53. These grades were more than sufficient at the end of the spring term to allow her to pass the ninth grade. C.A.J.A. 149, 263, 269, 271, 292-93.

Despite this significant improvement in Shannon's grades, her successful completion of the ninth grade, and the fact that "[p]arents and school personnel may request another IEP meeting at any time they feel that a change is needed in the student's IEP" (C.A.J.A. 366), Shannon's parents sought a formal administrative hearing during the summer of 1985. This hearing was essentially a challenge to the IEP they had been instrumental in shaping.

[4] Pursuant to 20 U.S.C. § 1412, the South Carolina State Board of Education adopted Regulation 43-243, which defines these programs. Under the itinerant approach, Shannon received individualized attention from a special education teacher just three periods per week. C.A.J.A. 122.

Pet. App. 5a. At the same time, but without informing school officials, Shannon's parents submitted an application on Shannon's behalf to Trident Academy, a private school for learning disabled children located over one hundred miles from their home. C.A.J.A. 169-70. On August 8, 1985, Shannon was accepted for admission to Trident. She began the tenth grade there that fall, and remained a student there until her graduation in 1988. During Shannon's time at Trident, it did not utilize the IEP procedure. In addition, it employed a number of teachers who were not certified in accordance with South Carolina State law. Pet. App. 11a-12a.

At the administrative hearing conducted on August 20, 1985, the local education agency hearing officer determined that the education program for Shannon set forth in the IEP was appropriate. Pet. App. 44a-54a. In addition, the hearing officer pointed out that other programs were available in the school district, should later test data or performance indicate a need for a change in placement. Pet. App. 54a. Shannon's parents appealed that decision to the state education agency which, on October 14, 1985, affirmed. Agreeing that the IEP provided an "appropriate education," the agency then turned to the propriety of placing Shannon in a school that did not permit her to live with her parents. "[T]he concept of least restrictive environment is violated in the extreme by removing this child from her natural family so that she might attend an institution alleged to have a better program than the public school setting." *Id.* at 42a.

3. *Judicial Proceedings*: In July 1986, over eight months after the hearing officer issued his decision and after Shannon had completed the tenth grade at Trident Academy, her parents filed suit on her behalf in the United States District Court for the District of South Carolina. The complaint alleged that the school district had failed to offer Shannon a "free appropriate public education" within the meaning of the Act. In addition, it alleged that the school district failed to comply with the Act's procedural requirements, thereby invalidating the IEP. Pet. App. 34a. Shannon's parents sought actual damages and retroactive

reimbursement for tuition and other costs associated with educating Shannon at a distance from home.

The district court, following an evidentiary hearing, concluded in an unpublished opinion that the school district had fulfilled all of the procedural requirements of the Act. Pet. App. 35a. However, the court found that the school district had failed to provide Shannon with a "free appropriate public education" under the Act. Pet. App. 36a. Central to the court's determination were the limited goals of the IEP; even if met, according to the court, Shannon would not be performing at grade level. *Id.* The court also found that the education offered at Trident had been appropriate for Shannon, based on expert testimony that, *inter alia*, Trident had "done a good job" of meeting Shannon's needs. Pet. App. 29a. The court concluded that the expenses incurred in sending her there -- which totalled more than $35,000 over a three-year period for tuition and fees, room and board, and trips to her home -- were reasonable. The court noted that "the defendant has offered no evidence that Shannon could have received the special educational services provided by Trident at any facility closer to her home or at a lower cost." Pet. App. 30a (footnote omitted). Accordingly, it ordered the school district to provide reimbursement for these costs. *Id.* at 39a.

On appeal, the Court of Appeals for the Fourth Circuit affirmed the district court's finding that the School District's program was inappropriate. Turning to the question of reimbursement, the court looked to this Court's decision in *Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, 471 U.S. 359 (1985), which ordered the retroactive reimbursement of parents who, presented with a public school placement that did not meet the requirements of the Act, unilaterally placed their child in a private school that did. Pet. App. 10a-11a. Unlike *Burlington*, however, where the school in which the student was unilaterally placed by his parents was a "state-approved private school for special education," 471 U.S. at 362, and therefore met the requirements of a FAPE, the court below acknowledged that

Trident Academy was not approved. Pet. App. 11a-12a.[5] In fact, Trident *could not* receive State approval because it employed uncertified teachers in violation of State law, and failed to implement IEPs as required by the Act. J.A. 13, 16.

Nonetheless, the court of appeals found that this failure of Trident to meet the statutory definition of a FAPE was not "fatal to the request for reimbursement." Pet. App. 12a. The court did recognize conflicting decisions among the courts of appeals on the precise question before it: whether reimbursement is proper under the Act for a private school chosen by the parents that does not have state approval. Pet. App. 15a. Rejecting the position taken by the Second Circuit in *Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.2d 563 (2d Cir. 1989), the court construed the language of 20 U.S.C. § 1413(a)(4)(B), which addresses the elements of a State Plan, as requiring private schools to meet basic State "educational standards" and the Act's IEP requirement only when the state places the child in the private school but not when parents effectuate the placement. Pet. App. 13a. The Court held that where parents act on their own and the "public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits,' *Rowley*, 458 U.S. at 207 -- the same standard by which the appropriateness of a public school's IEP is assessed." *Id.* at 16a-17a. The court stated that permitting reimbursement only as to state-approved private schools "would undermine the values and policies [of] the Act." *Id.* at 17a.

SUMMARY OF ARGUMENT

The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, requires states that receive federal funds

[5] The court noted that, at the time of trial, at least two faculty members at Trident, including one of Shannon's teachers, were not certified by the State of South Carolina. Pet. App. 11a.

for education of disabled children to provide such children with a "free appropriate public education," ("FAPE") 20 U.S.C. § 1412(1), a standard that is explicitly defined in the Act. 20 U.S.C. § 1401(a)(18). In order to satisfy the FAPE requirement for each disabled child, the state must provide an education that meets existing state educational standards, and that utilizes an "individualized educational plan," which this Court has described as the "*modus operandi* of the Act." *Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, 471 U.S. 359, 368 (1985). *See also Honig v. Doe*, 484 U.S. 305, 311 (1988) (Congress envisioned the IEP as "the centerpiece of the statute's education delivery system"). In working toward an appropriate placement for each child, the Act requires a "cooperative approach" between parents and school officials. *Burlington*, 471 U.S. at 368.

In this case, respondents initially worked with school officials in the formulation of an IEP, but thereafter determined to remove Shannon Carter from the public school and to place her in Trident Academy. This action was taken without inquiring further of local or state education officials as to whether Trident would in fact meet the statutory requirements of a FAPE, and the court below stated in its opinion that Trident in fact failed to meet two of those requirements. Pet. App. 11a-12a. Notwithstanding that fact, the court below concluded that respondents were entitled under the IDEA to receive full reimbursement for the costs of Shannon's attendance at Trident Academy. Pet. App. 12a.

In so holding, the court overrode the clear meaning of the statute, violated the fundamental principle that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges," *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988), and greatly impaired the financial ability of public school authorities to assure an appropriate education to all students.

ARGUMENT

I. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT PROVIDES NO LEGAL BASIS FOR COURT-ORDERED PUBLIC FUNDING OF A UNILATERALLY SELECTED PRIVATE SCHOOL PLACEMENT THAT FAILS TO MEET STATE EDUCATIONAL STANDARDS OR UTILIZE THE IEP PROCEDURE

The primary purpose of the Individuals with Disabilities Education Act is to "assure that all children with disabilities have available to them . . . a free appropriate public education." 20 U.S.C. § 1400(c). It pursues this goal by providing federal financial assistance to states that agree to comply with the requirements of the Act, including the requirement that they demonstrate to the Secretary of Education that they have "in effect a policy that assures all children with disabilities the right to a free appropriate public education." 20 U.S.C. § 1412(1). The statute in turn defines "free appropriate public education" as "special education and related services" that:

> (A) have been provided at public expense, under public supervision and direction, and without charge,
> (B) meet the standards of the State educational agency,
> * * *
> (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(a)(18).

The provision of a FAPE to each disabled student is to be accomplished principally through formulation and implementation of an IEP, which is the product of close cooperation between the school authorities and the child's parents. *See, e.g.*, 20 U.S.C. §§ 1401(a)(20), 1412(7), 1414(a)(1)(C)(iii), 1415(a)-(b). Where possible, the FAPE is to be provided within the public school setting, with the child participating as much as possible in the same activities as non-disabled children. 20 U.S.C. § 1412(5). If the public schools themselves are unable to provide the necessary services, the Act provides for placement in an appropriate private school at governmental expense. *Burlington*, 471 U.S. at 369. Even where a private school or facility implements a child's individualized education program, responsibility for compliance with the statute remains with the public agency. 34 C.F.R. § 300.347(c).

In *Burlington*, this Court addressed the difficult circumstance where parents believe that their child is not receiving an appropriate education in the public school and elect to place him in a private school. The Court held that under the authority conferred on courts by the IDEA to "grant such relief as the court determines is appropriate," 20 U.S.C. § 1415(e)(2), such parents may recover reimbursement for the cost of unilaterally placing their child in a private school, provided that the "court determines that a private placement desired by the parents was proper under the Act and that the IEP calling for placement in a public school was inappropriate." 471 U.S. at 370. In *Burlington*, where the school selected by the parents had been approved by the state for special education, *id.* at 362, it was undisputed that the private school placement was "proper under the Act," as one which the state itself could have initiated.[6] The issue presented here is whether the IDEA offers a basis in federal law for a court to order public funding of a private education unilaterally selected by parents which, unlike the private placement in *Burlington*, does not meet the statutory definition of a FAPE.

The court below was explicit in stating that the Trident Academy placement failed to provide Shannon Carter with a FAPE in two respects. *First*, the court of appeals noted that

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[6] Indeed, the Court in *Burlington* noted that it was "merely requir[ing] the Town to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP." 471 U.S. at 370-71.

Trident employed faculty members -- including one of Shannon's teachers -- who were not certified by the State, Pet. App. 11a-12a,[7] and thus failed to satisfy the requirement of Section 1401(a)(18)(B) that the education must "meet the standards of the State educational agency." *Second*, the court of appeals noted that Trident "does not attempt to comply with the terms of the Act," in that it failed to provide services in conformity with the individualized education program required under section 1414(a)(5). Pet. App. 11a.

In holding that respondents were nonetheless entitled to reimbursement, the court below pushed aside the Act's core requirement of a FAPE and its mandate of cooperative interaction of parents and public school authorities.[8] Instead, it ruled that once school authorities have offered a placement that fails to meet the requirements of the Act, the parents enjoy not only the right under *Burlington* to make a unilateral private school placement, but are entitled to reimbursement for that placement whether or

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[7] South Carolina's State Board of Education regulations require that private schools in which handicapped children have been duly placed conform with the Defined Minimum Program for South Carolina School Districts ("DMP"). S.C. Code Regs. 43-243(E)(7). The DMP expressly requires that a teacher of handicapped children for grades 9-12 be "certified or hold a permit in the area of handicapping condition in which the majority of the pupils are served." S.C. Dep't of Education, *Defined Minimum Program for South Carolina School Districts*, at 52 (1986), Pet. App. 71a-72a. South Carolina law sets forth explicit educational prerequisites to certification to teach children with particular types of handicaps. S.C. Code Regs. 43-62(K). Pet. App. 62a-71a.

[8] In doing so, the court below violated the principle that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The IDEA contains no condition -- and certainly no unambiguous condition -- requiring states to fund *Burlington*-type placements apart from the explicit statutory obligation to provide a FAPE.

not it satisfies state educational standards or implements the statute's IEP requirement. For the court below, once the state has itself failed to provide an appropriate placement, the explicit elements of the FAPE requirement are no longer operative. In particular, the state's educational standards and the IEP requirement become irrelevant to the issue of reimbursement; it is simply enough that the private school placement is "reasonably calculated," in the view of a court, "to enable the child to receive educational benefits." Pet. App. 17a.

This conclusion is most obviously flawed as a straightforward matter of statutory language. As this Court has recognized, "[w]e have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 112 S.Ct. 1146, 1149 (1992). The state's obligation under the statute is to provide a FAPE, and the placement selected by respondents is concededly not that. That lack of ambiguity in the statute's language instructs that the "judicial inquiry is complete." *Id.* (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

One looks in vain through the provisions of the IDEA for language justifying compulsory public funding of such an education that falls short of the statute's explicit requirements. Nor is this quest assisted at all by the maxim that the provisions of a statute must be reconciled with its express overall purpose. *See Federal Power Comm'n v. Panhandle Eastern Pipe Line*, 337 U.S. 498, 514 (1949); *Shapiro v. United States*, 335 U.S. 1, 31-32 (1948). *See also* discussion at pp. 22-24, *infra*.

Such reasoning cannot be justified, as the court below sought to do, on the ground that it utilizes the same test used in *Board of Educ. v. Rowley*, 458 U.S. 176 (1982), to evaluate a public school student's IEP -- that is, whether the placement was

"reasonably calculated to provide educational benefits."[9] There, that deferential standard was adopted by this Court precisely because the procedural requirements of the statute -- including the IEP requirement and the cooperative efforts of parents and school authorities, guided as they are by experience and state educational standards -- were seen as the primary means by which the goals of the Act are to be achieved.[10] But the lax standard of review for an IEP makes no sense where the statute's substantive and procedural requirements are rendered inoperative by a court of

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[9] Specifically, the court below stated:

> [W]hen a public school system has defaulted on its obligations under the Act, a private school placement is "proper under the Act" if the education provided by the private school is "reasonably calculated to enable the child to receive educational benefits," *Rowley*, 458 U.S. at 207 -- the same standard by which the appropriateness of a public school's IEP is assessed.

Pet. App. 16a-17a.

[10] As the Court in *Rowley* stated:

> We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

458 U.S. at 206. In the face of these and other procedural requirements, and in order to prevent courts from "imposing their view of preferable educational methods upon the States," *id.* at 207, the Court adopted the deferential test applied by the court of appeals in this case:

> [A] court's inquiry in suits brought under § 1415(e)(2) [seeking review of an IEP] is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Id. at 206-207.

appeals decision holding that they do not apply to a unilateral *Burlington*-type parental placement.

Reimbursement in the event of a unilateral, *Burlington*-type placement that fails to provide a FAPE is not made any more compelling by the remedial overlay of 20 U.S.C. § 1415(e)(2), authorizing courts to "grant such relief as the court determines is appropriate." It is precisely that provision which this Court construed in *Burlington*, when it stated that "[a]bsent other reference, the only possible interpretation is that the relief is to be 'appropriate' in light of the purpose of the Act . . . . principally to provide handicapped children with a 'free appropriate public education and related services . . . designed to meet their unique needs.'" 471 U.S. at 369 (quoting 20 U.S.C. § 1400(c)).

On its face, this goal is not furthered by requiring public funding under the Act of an education that is not a FAPE. In the present instance, such action defeats essential, explicit legislative objectives, by authorizing a publicly funded special education that fails to utilize the IEP process and ignores educational standards adopted for general application throughout the State. As made clear in *Rowley*, the IEP and other procedural elements of the statute are central and not dispensable to the statutory scheme. *See* 458 U.S. at 205-206. And Congress certainly did not intend to create a federally funded program that eliminated state educational standards.[11]

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[11] The words of the statute indicate an intent by Congress to apply a universal definition of FAPE throughout the Act. According to section 1401(a)(18), "free appropriate public education *means* special education and related services that" fulfill four requirements, including the obligation to meet the standards of the state educational agency. "As '[a] rule, a definition which declares what a term "means" [as compared to what a term includes] . . . excludes any meaning that is not stated.'" *Colautti v. Franklin*, 439 U.S. 379, 392-93 n.10 (1979) (quoting 2A C. Sands, *Statutes and Statutory Construction* § 47.07 (4th ed. Supp. 1978)).

Thus, viewed prospectively, the court of appeals' approach greatly undermines the future effectiveness of the statute by offering both opportunity and incentive to parents in a *Burlington* situation to proceed without any consultation as to state educational standards and without concern to adhere to the IEP process. *See* p. 24, *infra*. While the remedial provision of the statute is indeed "a broad grant of equitable power designed to provide courts maximum flexibility in effectuating the statutory objectives," *Doe v. Brookline Sch. Comm.*, 722 F.2d 910, 919 (1st Cir. 1983) (quoted in Pet. App. 18a), it offers no grounds to ignore explicit statutory requirements that are critical to the legislative scheme. *See, e.g.*, Sutherland, *Stat. Const.* § 27.02 (4th ed. 1985 Revision).

In its decision, the court below attached particular significance to the language of 20 U.S.C. § 1413(a), which sets forth the "requisite features" of the State Plan to be submitted to the Secretary of Education by the educational agency of any state desiring to receive funding under the IDEA.[12] The court

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[12] Specifically, the court of appeals turned its attention to section 1413(a)(4)(B). Pet. App. 12a. That section states in pertinent part that:

> Each such plan shall –
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> * * *
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> (4) set forth policies and procedures to assure -
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> * * *
>
> (B) that –
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> (i) children with disabilities in private schools and facilities will be provided special education and related services (in conformance with an individualized education program as required by this subchapter) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency . . .; and
>
> (ii) in all such instances, the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies. . . .

Pet. App. 58a.

concluded from this language that the "requirement that private schools receiving funds under the Act meet state educational standards[ ] would apply only when the child is placed in the private school by the state or local school system" and that "[t]he Act itself simply imposes no requirement that the private school be approved by the state in parent-placement reimbursement cases." Pet. App. 13a.

This conclusion is not supported by the language of § 1413(a)(4)(B).[13] That section was enacted -- in its current form for all relevant purposes -- as part of Public Law 94-142, 89 Stat. 773, on November 29, 1975.[14] At that time, of course, the statute contained a provision, as it does today, stating that:

> During the pendency of any proceedings [seeking review of an IEP] conducted pursuant to [§ 1415], unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child . . . .

20 U.S.C. § 1415(e)(3). It was not until ten years later, in 1985, that this Court in *Burlington* addressed the issue of whether parents who unilaterally withdraw their child from a public school

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[13] As one commentator has noted, "it seems counterintuitive to suggest that the state is prohibited from paying for a private school education if public officials have placed a disabled child in an unapproved school, but the state is compelled to reimburse parents when they unilaterally place their child in the same school." Jerry Parkinson, *Parents' Unilateral Placement of a Disabled Child in an Unapproved Private School: A "Free Appropriate Public Education"?*, 76 Educ. L. Rep. 893, 908 (1992).

[14] Section 1413(a)(4)(B) has been subsequently amended only to change references to "handicapped children" to "children with disabilities." *See* Pub. L. No. 101-476, 104 Stat. 1103 (1990).

before exhausting review procedures may ever receive reimbursement with public funds.[15]

Thus, at the time that the language of § 1413(a)(4)(B) was drafted, it is likely that the drafters did not even have in mind the eventuality presented by *Burlington* and this case, of parents unilaterally withdrawing their child before review proceedings were completed. Any inference -- by negative implication from the failure of § 1413(a)(4)(B) to address that circumstance -- of intent to modify the statute's explicit FAPE requirement is thus not persuasive.

Even if one could fairly suppose that the drafters of section 1413(a) contemplated the *Burlington* possibility of unilateral parental placements due to dissatisfaction with the public school offering, § 1413(a)(4)(B) does not support the court of appeals' conclusion because it does not purport to qualify or address in any way the explicit statutory obligation of participating states to assure to each disabled student a FAPE. Section 1413(a), rather, deals with what must be included in the Plan that each state must submit as a condition of its participation in the program. Relating as it does to the State Plans and not to the overall statutory obligation to provide a FAPE, § 1413(a)(4)(B) cannot be viewed as a more specific provision relating to the FAPE requirement, on which basis the general obligation to provide a FAPE, set forth in §§ 1401(a)(18) and 1412(1), could be modified.

In any event, it is clear under the statute that states are required, as a condition of eligibility, to demonstrate that they have developed a Plan which "shall set forth in detail the policies and procedures which the State will undertake or has undertaken

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[15] The Court in *Burlington* held that § 1415(e)(3), while not foreclosing a unilateral parental placement, operates in such a way that where parents take that action, they will not be reimbursed if the court ultimately determines that the original placement was appropriate. 471 U.S. at 373-374.

in order to assure that . . . a free appropriate public education will be available *for all children with disabilities*." 20 U.S.C. § 1412(2)(B) (emphasis added). Based on this and other language scattered throughout the statute, there can be no argument that the FAPE requirement is rendered inapplicable by the language of § 1413(a)(4)(B) in the case of a unilateral parental placement at public expense. *See* 20 U.S.C. § 1412(3) (State must demonstrate to the Secretary that it "has established priorities for providing a FAPE *to all children with disabilities*") (emphasis added); § 1414(a)(1)(C)(ii) (local educational agency seeking federal funding shall provide assurance that such payments will be used to fund, *inter alia*, "the provision of, and the establishment of priorities for providing, a free appropriate public education *to all children with disabilities*") (emphasis added); § 1414(e) (state may reallocate funds from one local education agency only upon determining that that agency "is adequately providing a free appropriate public education *to all children with disabilities* residing in the area served by such agency") (emphasis added).

Accordingly, based on the language of the IDEA, it can only be read as imposing on states an obligation to provide a FAPE as that term is defined in the statute. Neither the statute's remedial provision, § 1415(e)(2), nor the language of § 1413(a)(4)(B) setting out required elements of the State Plan, offer any legal basis for a court to compel funding, in these circumstances,[16] of a private placement unilaterally selected by parents that does not conform to the FAPE requirement that is at the heart of the Act.

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[16] This case does not present the more difficult question raised where school authorities so conduct themselves as to prevent parents from learning whether state educational requirements are satisfied by a particular private school. *See* pp. 25-26, *infra*.

II. COURT-ORDERED PUBLIC REIMBURSEMENT OF PARENTS FOR A UNILATERAL PRIVATE SCHOOL PLACEMENT THAT FAILS TO MEET STATE STANDARDS OR PROVIDE AN IEP IS CONTRARY TO THE PURPOSES OF THE IDEA

A. The Decision Below Undermines The Role Of The States As The Primary Educational Authority In Formulating Policy In Cooperation With Parents

In what this Court termed a "clear statutory directive," Congress, in the IDEA, left "[t]he primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs . . . to state and local educational agencies in cooperation with the parents or guardian of the child." *Rowley*, 458 U.S. at 207.[17] At the same time, Congress specifically intended in the IDEA to foster interaction and cooperation between parents and school authorities. *See id.* at 206 (noting Congress' "emphasis upon full participation of concerned parties throughout the development of the IEP"); *Burlington*, 471 U.S. at 368 (parents and school officials must work together in a "cooperative approach"). Indeed, cooperation and consultation between parents and school officials in developing the child's program and assessing its effectiveness are at the core of the Act. *See* 20 U.S.C. §§ 1400(c), 1401(a)(20), 1415(b)(1)(A),(C),(D),(E), and 1415(b)(2); 34 CFR § 300.345.[18]

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[17] Congress, in passing the Act, "was aware of the states' traditional role in the formulation and execution of educational policy." *Rowley*, 458 U.S. at 207 n.30. In fact, Congress took pains in enacting the Act not to "displace the primacy of states in the field of education" but rather "to assist them in extending their educational systems to the handicapped." *Id.* at 208.

[18] Thus, for example, parents must attend meetings with school officials to formulate an IEP as defined by the Act. 20 U.S.C. § 1401(a)(20). This interwoven scheme of consultation was deliberately designed by Congress to "provide for an ongoing process of consultation and comment by interested individuals and organizations . . . ." S. Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1448.

This statutory vision of primary responsibility residing in state and local school agencies, and a cooperative interaction between them and parents, is incompatible with the holding of the court below. For under that decision, once the public agency provides a placement that is inappropriate under the Act, parents are freed to pursue a private placement, at public expense, without further consultation of the state or regard for state educational standards or the IEP requirement of the Act.[19]

The issue here, on the one hand, involves proper recognition of state authority. The IDEA clearly did not contemplate a construction that displaces the states wholesale from participation in the expenditure of public special education funds in a substantial category of cases. The substitution of the courts -- and especially the federal courts -- as the arbiter of first and last resort on the propriety of *Burlington*-type parental placements is completely out of keeping with the spirit as well as the letter of the Act. *See Rowley*, 458 U.S. at 208 (noting that courts "lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy'") (quoting *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973)). Accordingly, this Court has cautioned lower federal courts *not* "to substitute their own notions of sound educational policy" for those of school authorities. *Rowley*, 458 U.S. at 206.

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[19] The only prerequisites to public reimbursement, according to the court of appeals, are that the state failed to provide a FAPE, and that the parents' private placement be reasonably calculated to enable the child to receive educational benefits. Pet. App. 17a.

This jettisoning of state standards fundamentally violates the federalism balance so carefully struck in the Act.[20]

On the other hand, permitting parents to ignore state educational standards and the input of state officials in selecting a private placement is highly disruptive to the spirit of cooperation and consultation that is central to the IDEA. The duty of consultation, which exists under the statute throughout the process of formulating and implementing an appropriate placement, is abruptly terminated, according to the court below, by a single occurrence -- the school district's provision of a placement that is ultimately found to be inappropriate. The liberating effects of that occurrence -- not only from the duty of consultation, but from any requirement of compliance with state standards or adherence to the IEP process -- are likely to give it watershed significance in the minds of parents motivated by their own purposes. The opportunity to escape the constraining procedural and substantive mandate of the Act is likely to be a vehicle of major mischief to many parents wishing to fulfill their own personal vision of the "best" for their children at public expense. Thus, the impairment of cooperation under the Act is probably not limited to those cases where parents in fact undertake a unilateral placement. The existence of this "loophole" in the statute's otherwise clear mandate is likely to affect some parents' approach to the IEP process as a whole.[21]

It is also clear that the approach of the court below cannot be justified on the theory that adherence to the requirements of the

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[20] Justice O'Connor has remarked that "[p]rinciples of federalism inherent in our constitutional system" and "the principle of grantee autonomy" apply with special force when federal grant recipients are state or local governments. *Dixon v. United States*, 465 U.S. 482, 509 (1984) (O'Connor, J., dissenting).

[21] Indeed, this case may well be a good illustration of parents seeking to use the IEP process as a means of securing public funding for a private placement desired from the start. *See* pp. 6-10, *supra*.

statute is inherently unreasonable and burdensome in those cases where a public school placement is found wanting. The inappropriateness of one placement does not suggest that the educational standards of the state where it occurred are somehow lacking in merit. Nor does it indicate that the authorities with whom one has dealt have acted in bad faith, or are incapable or unwilling to confer on basic issues, such as the question of whether a particular private school meets standards imposed by state and federal law.

The facts of this case make it a particularly inappropriate one in which to announce a rule casting parents free to make their own choices upon the occurrence of a single failing. The school authorities allowed the Carters to handpick the special education teacher who would work with Shannon, after the Carters successfully prevailed upon the school district to provide an "itinerant" rather than a "resource room" placement. Likewise, the school district located another counselor to perform tests of Shannon's ability and achievement after the Carters registered their objections to the counselor initially chosen. In addition, the school district accepted the goals proposed by the Carters' own social worker. This was a school district intent on working with the parents to achieve the proper educational program.

Remarkably, the Carters made no inquiries of public school authorities prior to enrolling Shannon in Trident. There are no facts in the record which suggest that Shannon's parents even once requested information about appropriate private school placements; nor is there any evidence that would support an inference that the school district engaged in any wrongdoing with regard to the provision of such information.[22] Meanwhile,

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[22] The Supreme Court in *Burlington* recognized that "equitable considerations are relevant in fashioning relief." 471 U.S. at 374. Thus, if school officials act in bad faith or refuse to cooperate in the joint effort to provide an appropriate education for disabled children, courts may remedy the situation in an appropriate fashion. But this

during the course of this litigation, Respondents have not alleged either that the school district failed to provide information about approved private schools, or that such failure provided the impetus for their decision to register Shannon at Trident Academy. Respondents simply failed to ask.

Absent a continuing responsibility on the part of parents and school authorities to confer even minimally, the IDEA is likely to become a vehicle for serious disruption in the formulation of special education policy. Parents may have a variety of reasons -- many of them unrelated to educational merit -- for preferring to circumvent rather than capitalize on public school services and for desiring to send a child to a certain private school. Parents are certainly free to consider such factors when they are paying for the education of their child, but they cannot engage in such "cherry-picking" under the sponsorship of the IDEA. Limiting reimbursement to state-approved schools otherwise satisfying the requirements of a FAPE, mandating continued communication and cooperation, and preserving state authority over statutory compliance are essential if the IDEA is not to become a vehicle of educational disruption.

B. The Decision Below Threatens The Financial Health Of The Public School System

The decision below also threatens the school district's ability to function equitably, or perhaps at all. The financial impact on school districts of what essentially amounts to a judicially-imposed, discriminatory voucher system is well-illustrated by this case. The average per pupil expenditure in Florence County School District Four is $4,102.56, *see* S.C. Dep't of Education, *Ranking of the Counties and School Districts of South Carolina 1990-91* at 233, Table 87 (1992); here, the costs to the school district of educating Shannon Carter at Trident -- including

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record contains no allegations of bad faith on the part of the school authorities.

tuition, travel costs associated with visits home, and room and board -- amounted to nearly $12,000.00 per year. While there are surely instances where expenditures of such magnitude are required, they must be undertaken with care. Parents in the *Burlington* situation must not be left free of virtually all constraints to select any private education of their choice, so long as it meets the minimal requirement of allowing the child to receive educational benefits. School "resources are not infinite and many other demands compete for limited public funds." *Lunceford v. District of Columbia Bd. of Educ.*, 745 F.2d 1577, 1583 (D.C. Cir. 1984). Every dollar paid to reimburse the Carters for Shannon's private education is one less dollar available to the students of this rural, low-income district.

Meanwhile, state obligations under the IDEA are increasing as both the number and percentage of students with disabilities under the IDEA have steadily risen since 1976 -- close to 5 million children were served under the IDEA during the 1990-91 school year, an increase of 2.8 percent over the previous school year. U.S. Dep't of Education, *Fourteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act*, at xvii (1992). Notwithstanding the expectation of a significant federal contribution to funding the IDEA, *see* S.Rep. No. 168, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1439, the federal government has played only a minimal role in actually providing funds for children with disabilities. For fiscal year 1992, the average federal contribution under the IDEA state grants program was approximately $409.00 per child. U.S. Dep't of Education, *Individuals with Disabilities Education Act: Program-Funded Activities, Fiscal Year 1992*, at 4 (1992). Federal funds thus cover just 7 percent of the average excess cost of educating a child with disabilities in the United States. U.S. Dep't of Education, *Justifications of Appropriation Estimates to the Congress, Fiscal Year 1994*, at F-19 (1993).

Education is easily the largest of all state expenditures; in 1990, spending for education comprised 32 percent of all state

government spending. Council of State Governments, *The Book of the States 1992-93*, at 368 (1992). Yet having dedicated a large portion of their revenue to educational spending, most state governments -- now facing their worst financial crisis in decades -- are ill-equipped to shoulder the extra cost of funding for inappropriate placements. The state of the states' fiscal health may have reached a new low-water mark last year: in fiscal year 1992, 31 states reported that tax collections fell below the projections used to make up their budgets; 29 states raised taxes; and 35 states were forced to cut spending at least $5.7 billion below levels initially approved in 1992. Chris Pipho, *Fiscal Gridlock*, Educational Finance, Feb. 1993, at 430. Additionally, state government indebtedness at the end of fiscal year 1990 totaled $318.3 billion, up 7.7 percent from the previous year. *Book of States 1992-93*, at 369. During the next decade, education will thus be competing more keenly than ever with other state programs for the modest amounts of new state revenues.

At the same time, the federal share of education funding overall -- including funding for all public elementary and secondary school education -- has dropped in the last decade, from 10 percent in 1980 to 6.1 percent in 1990. Jay Taylor, *Desperate for Dollars*, The American School Board Journal, Sept. 1992, at 21. Additionally, along with reductions in its discretionary aid to state governments, Congress has increasingly passed the costs of policy initiatives on to state governments in the form of mandated programs, creating additional demands on state treasuries. The Omnibus Budget Reconciliation Act of 1990 alone added more than $13.3 billion in additional costs to state and local governments. Martha Fabricius, *More Dictates From the Feds*, State Legislatures, Feb. 1991, at 28.

In short, the judicially-compelled, public funding of private education, on facts like those presented here, not only is contrary to the letter and spirit of the IDEA -- it is also seriously disruptive to the ability of states to carry the fiscal burden of an appropriate public education for all children.

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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